

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSE ALFREDO HERRERA,

Defendant-Appellant.

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UNPUBLISHED

July 26, 2005

No. 249569

Oakland Circuit Court

LC No. 2002-187113-FC

Before: Neff, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of possession with intent to deliver 650 or more grams of cocaine, MCL 333.7401(2)(a)(i).<sup>1</sup> Defendant was sentenced to a prison term of twenty to forty years. We affirm.

Defendant first argues that the trial court abused its discretion, *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998), when it allowed admission of evidence that defendant was allegedly selling drugs five days before the search warrant was executed in this case under MRE 404(b). However, defendant has waived this issue by failing to provide this Court with a transcript of the hearing on his motion to exclude the MRE 404(b) evidence. MCR 7.210(B)(1)(a); *People v Petrella*, 124 Mich App 754, 755; 336 NW2d 761 (1983), aff'd 424 Mich 221 (1985).

Regardless, we conclude that the trial court did not abuse its discretion in admitting the evidence at issue because the evidence of defendant's alleged drug sales showed the events leading up to the investigating officer obtaining the search warrant in this case. Therefore, it falls under the *res gestae* exception to MRE 404(b). *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996) (stating that "[e]vidence of other criminal acts is admissible when so blended or connected with the crime of which defendant is accused that proof of one incidentally involves the other or explains the circumstances of the crime"); see also *People v Bowers*, 136 Mich App 284, 294; 356 NW2d 618 (1984) (noting that the *res gestae* exception allows introduction of evidence of other criminal activity and is applied in cases where the act or

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<sup>1</sup> MCL 333.7401(2)(a)(i) has since been amended to increase the statutory minimum from 650 grams to 1,000 grams. 2002 PA 665.

conduct evidence is “introduced for the purpose of explaining the circumstances leading up to the charged offense” and “not offered to prove that [the] defendant, by virtue of his commission of the separate act, had committed the offense for which he was on trial”).

Next, defendant argues that there was insufficient evidence to support his conviction of possession with intent to deliver 650 or more grams of cocaine, based on either direct commission of the crime or aiding and abetting. We review a claim of insufficient evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt. *People v Fletcher*, 260 Mich App 531, 559; 679 NW2d 127 (2004). However, we will not interfere with the jury’s role in determining the weight of the evidence or the credibility of the witnesses. *Id.* at 561.

To obtain a conviction for possession with intent to deliver 650 or more grams of cocaine, the prosecution was required to prove the following elements: (1) that the recovered substance is cocaine; (2) that the cocaine is in a mixture weighing 650 grams or more; (3) that defendant was not authorized to possess the cocaine; and (4) that defendant knowingly possessed the cocaine with the intent to deliver. MCL 333.7401(2)(a)(i); *People v Wolfe*, 440 Mich 508, 516-517; 489 NW2d 748, mod 441 Mich 1201 (1992).

Because defendant acknowledges that there was sufficient evidence presented at trial to establish the other elements, he challenges the sufficiency of the evidence only with respect to the fourth element—that he either actually or constructively possessed the cocaine. Essentially, defendant argues that there was no sufficient nexus between him and the cocaine to establish constructive possession and there was insufficient evidence to convict him under an aiding and abetting theory. We disagree.

“A person need not have actual physical possession of a controlled substance to be guilty of possessing it.” *Id.* at 519-520. Possession can be either actual or constructive. *Id.* at 520. “The essential question is whether the defendant had dominion or control over the controlled substance.” *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995). Further, one can possess a controlled substance without actually owning it, and one can possess a controlled substance jointly with one or more others. *People v Griffin*, 235 Mich App 27, 34; 597 NW2d 176 (1999), citing *Wolfe, supra* at 520. However, “a person’s presence, by itself, at a location where drugs are found is insufficient to prove constructive possession.” *Wolfe, supra* at 520. “Mere proximity to the drug, mere presence on the property where it is located, or mere association, without more, with the person who does control the drug or the property on which it is found is insufficient to support a finding of possession.” *Griffin, supra* at 35 (citations omitted). Rather, “constructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband.” *Wolfe, supra* at 521. Lastly, possession with intent to deliver can be established by circumstantial evidence and reasonable inferences arising from that evidence. *Id.* at 526.

We find that the evidence presented at trial was sufficient to show that defendant had constructive possession over the cocaine because he had knowledge of its presence and a right to exercise control over it. *Wolfe, supra* at 520. Almost nine kilos of cocaine and nearly \$30,000 in cash were found in the apartment that defendant lived in and had control over. At the time of the raid, defendant had been living in that apartment for more than a year. Police officers testified that the apartment had an overwhelming smell of cocaine. Two wallets belonging to defendant

were found in the dining room with almost \$500 in them, but defendant was unemployed at the time of the raid. Further, while it can be argued that defendant did not have control over the bedroom where the cocaine was found because he slept in the living room, there was evidence of packaging and distribution of the drugs within the common areas of the house, i.e., heat-seal materials were found on top of the refrigerator in plain view and packaging materials, cutting agents, and a digital scale were found in the dining room closet. Further, defendant was observed allegedly selling drugs in a bar parking lot five days prior to the raid. When viewed in the light most favorable to the prosecution, we conclude that there was sufficient evidence to find that defendant directly committed the crime of possession with intent to deliver 650 or more grams of cocaine.

Further, we find that the evidence was also sufficient to support the prosecution's aiding and abetting theory. An aider and abettor may be convicted and punished as if he directly committed the offense. MCL 767.39; *People v Mass*, 464 Mich 615, 628; 628 NW2d 540 (2001). To obtain a conviction of aiding and abetting, the prosecutor must show the following: (1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time aid and encouragement was given. *People v Moore*, 470 Mich 56, 67-68; 679 NW2d 41 (2004). Generally, an aider and abettor must have the same requisite intent as that required of the principal. *Mass*, *supra* at 628. An aider and abettor's state of mind may be inferred from all of the facts and circumstances, including factors such as a close association between the defendant and the principal, the defendant's participation in the planning or execution of the crime, and evidence of flight after the crime. *People v Carines*, 460 Mich 750, 757-758; 597 NW2d 130 (1999). However, a defendant's mere presence at a crime, even with knowledge that the offense is about to be committed, is not enough to make a defendant an aider and abettor. *People v Norris*, 236 Mich App 411, 419-420; 600 NW2d 658 (1999). Some advice, aid, or encouragement is required. *Moore*, *supra* at 71. Here, there was evidence that, at minimum, by allowing this drug enterprise to occur in his home, defendant gave aid and encouragement in committing the crime of possession with intent to deliver 650 or more grams of cocaine.

Therefore, because the evidence was sufficient to support a finding of guilt under either theory, defendant's conviction is affirmed.

Affirmed.

/s/ Janet T. Neff  
/s/ Michael R. Smolenski  
/s/ Michael J. Talbot